87-249

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANDREW A. HANDY,
Petitioner,

v.

NATIONAL SECURITY AGENCY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a vague and arbitrary informal promotion system in which blacks fare poorly, violate Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.)?

2. May objective qualifications be disregarded in the comparison of candidates under Title VII, to ascertain whether the employer's stated non-discriminatory reason for selection, is pretextual? Specifically, did the District Court err in holding that legal training used in petitioner's work was not relevant to promotion consideration where the agency's promotion regulation so requires?

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit included:

Andrew A. Handy

Plaintiff/Appellant

v.

National Security Agency

William E. Odom, Director of the National Security Agency and his Successors

United States of America

Defendants/Appellees

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

October Term, 1987

_____

ANDREW A. HANDY,
Petitioner,

v.

NATIONAL SECURITY AGENCY, et al.,
Respondents.

_____

PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

_____

The Petitioner, Andrew A. Handy, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit, entered in this proceeding on March 11, 1987, and rehearing denied on May 15, 1987.

OPINIONS BELOW

The unpublished per curiam opinion of the Court of Appeals for the Fourth Circuit is reproduced in the attached Appendix at pages 1a-5a. The Memorandum Opinion of the United States District Court for the District of Maryland, also unpublished, is Appendix pages 6a-55a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1987. The Petition for Rehearing with Suggestion for Rehearing in Banc was denied on May 15, 1987. Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Title VII of the Civil Right Act of 1964, as amended, provides as follows:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (42 U.S.C. §2000e-2)

The Agency regulation, "Promotion Criteria," NSA PM Chapter 337.3 is reproduced at Appendix pages 56a-64a herein.

STATEMENT OF THE CASE

Petitioner Andrew Handy, a black attorney, has been employed by the National Security Agency since 1965; since 1969 he has been a personnelist in

"M" (Management) organization. In 1971 he was professionally certified as a Personnel Officer by an expert career panel, which rated him ninth of 39 similarly situated persons for whom scores were available. In 1972 he obtained a law degree, passed the Bar exam and became a member of the Maryland Bar. From 1978 on his work at NSA involved the writing, interpretation or implementation of regulations, statutes and policies, and advising the Director of M on these matters. In 1980 his Staff Chief wrote as follows:

> Mr. Handy (as a GG [Grade]-12) has performed in a highly professional manner staff functions of the same magnitude of complexity and scope as persons assigned at the GG-13 level. He has demonstrated the potential for advancement and should be strongly considered as a candidate for promotion to GG-13.
>
> (Record, A.Exh. 6-8, promotion nomination)

Although he became eligible for promotion to Grade 13 in 1975, he was not promoted until 1983, although he had been performing Grade 13 work for several years. During this period most of Petitioner's white co-workers were promoted ahead of him, including Security Officers with high-school degrees whose services, while certainly valuable, were not commensurate with Mr. Handy's training, experience, and level of responsibility. None of his black counterparts were promoted to Grade 13 until he filed an EEO complaint in 1980. Following his complaint all black similarly-situated persons in his organization were promoted ahead of him.

Individuals eligible for promotion were reviewed automatically on a quarterly basis by an ascending chain of predominantly white managers, going from staff chief to organization board, to

organization head, to agency promotion board, to the Agency Deputy Director, who made the promotions. The informal purpose of the review, and of testimony by managers to the boards, was to identify whether a candidate was a "fast-tracker" suitable for immediate promotion, or a "slow-tracker," who would eventually be promoted as a reward for long and loyal service. The Agency's Promotion Criteria regulation (Appendix at 56a-64a) did not authorize or rationalize such a typology.

At trial the Agency claimed petitioner was not a "fast-tracker," despite his law degree and the fact he had been performing Grade 13 work for years. Agencywide data supplied by NSA showed blacks were treated as "slow-trackers;" blacks were only half as likely as whites to be promoted, or to receive top performance ratings.

Petitioner exhausted administrative

procedures under Title VII and had a bench trial in the U.S. District Court in Baltimore, which had jurisdiction under 42 U.S.C. §2000e-5(f)(3). A decision was issued which concluded that, although petitioner had made a prima facie case of disparate treatment in promotion because of race, he was not promoted earlier because white candidates were appropriately determined by the Agency to be better qualified under the two-track Agency program "designed to promote quickly persons with outstanding performance and high potential for future advancement so that they would remain NSA employees...and to reward employees who...were not outstanding [but] had consistently been faithful and excellent performers for a long period of time." (Appendix at 38a.) The court made no finding concerning the lack of authorization of the two-track system in

the Agency's written promotion criteria, or its arbitrariness. In comparing Mr. Handy's qualifications to earlier promotees, the District Court expressly did not consider his legal training, dismissing it as "not a requirement for [Petitioner's] work." (Appendix at 45a.) The District Court also concluded Mr. Handy had not proven retaliation for having pursued EEC proceedings.

Petitioner appealed the District Court decision to the U.S. Court of Appeals for the Fourth Circuit, on several bases. These included the discriminatory promotion system, the failure to consider Mr. Handy's legal training, the failure to make findings on the subjective and discriminatory performance evaluation system despite expert testimony, the erroneous misinterpretation of expert testimony on other subjects, the biased and

erroneous comparison of Mr. Handy's qualifications with selected others, including the failure to find pretextual an allegation that Mr. Handy sometimes had difficulty with deadlines, in light of his Staff Chief's repeated statement that Mr. Handy "has demonstrated his ability...to meet required deadlines with a quality product." (Record, J.App.Exh. at 7.) Mr. Handy also appealed the failure to consider agencywide and organization data clearly demonstrating discrimination in promotions, performance ratings and awards. Petitioner requested reassignment of the case to another District Court judge because of the manner in which the case had been handled by the District Court, including obstruction of his witnesses' testimony, and constant badgering of Petitioner's counsel. The Fourth Circuit panel,

however, affirmed the judgment below in a two-page per curiam decision (Case No. 86-1155) which lacked any discussion of contested facts or legal issues.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURT'S APPROVAL OF THE VAGUE AND ARBITRARY TWO-TRACK PROMOTION SYSTEM POSES AN IMPORTANT QUESTION WHICH MUST BE RESOLVED BY THIS COURT.

A. This Court Needs to Speak on Promotion Systems, as It Has on Employment Tests, and Deviations from Regular Employment Procedures.

This Court has previously held that a facially neutral employment test which has disparate impact on racial minorities violates Title VII. Griggs v. Duke Power Co., 401 U.S. 424 (1971). It has also held that deviation from a usual practice, or a written rule during an employment selection process creates an inference of discrimination under Title

VII. McDonnell Douglas Corp. v Green, 411 U.S. 792 (1973) and McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). The Court is now asked to provide guidance by deciding whether a vague and arbitrary promotion system violates Title VII, where blacks fare more poorly than whites, and where it is not authorized by the agency's promotion regulation.

B. The Informal Two-Track System Is a Camouflage for Discrimination because It Is Vague, Arbitrary, Subjective, and Discriminatory in its Effect.

1. The Two-Track System Is Not Properly Authorized.

The Agency's position, relied upon by the District Court, was as follows:

> [T]he promotion system is....designed to promote fast-track people. That is the people who are identified as outstanding performers with tremendous potential for future management positions...And those are going to be the

people who have shorter time in grade.

....

[T]hen there's the other category of people...those ...with long periods of dedicated, excellent service who also have to be rewarded because in fact they are the real backbone. There are more of them than the fast-trackers....Mr. Handy believes that he belongs with the fast-trackers, and management... believed...that Mr. Handy is an excellent performer and has done excellent work for the Agency, but he's not a fast-tracker.

(Transcript, February 7, 1986 at 69-71)

The Agency offered no evidence that the two-track system was authorized or that there were written guidelines for it. It was undisputed that the official Promotion Criteria were those in the properly promulgated regulation (Appendix 56a-64a), which included the criteria of experience, training, performance, potential, attributes, abilities and professional certification. The Criteria

did not establish, authorize or imply a dichotomy into two types of candidates; rather, it listed one set of criteria against which all candidates should be measured equally.

2. The Two-Track System Is Irrational and Arbitrary.

The Agency offered no evidence that candidates' abilities actually occur at opposite ends of the spectrum: slow, or fast. No validation studies had been performed, nor had any data suggested such a typology. In fact, the typology is discredited by the well-known normal curve of distribution of intelligence, and of performance, which is the bell-shaped curve where ninety percent of the population is clustered around the middle. Since almost all similarly-situated candidates were promoted, one would expect the promotions to occur around a median time-in-grade, rather

than to be clustered in either promotions with short time-in-grade or lengthy time-in-grade as in the two-track system. Therefore, the two-track system is irrational and arbitrary.

The Agency did not describe any objective means of ascertaining in which category candidates fell; the determination was made by white managers who made promotion recommendations, and who comprised the large majority of the promotion boards. Therefore, the system was totally subjective, and at the discretion of white managers. Where promotions into professional and managerial ranks are subjective, arbitrary, discretionary, and lack written guidelines, they have been held to violate Title VII, if blacks have fared poorly:

> [T]he absence of objective criteria governing promotions into supervisory positions, and [the] complete reliance on

> managerial discretion in making promotion decisions are classic means by which minorities are locked into static positions. Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1277 (4th Cir. 1981).

See also Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982), in which white managers used subjective criteria to make promotions resulting in very few blacks in the managerial ranks. The court held that such systems must be subjected to very close scrutiny because they are susceptible to discriminatory abuse. Id. 563, n.15.

3. The Two-Track System Is Discriminatory in Its Effect.

Data furnished by the Agency showed that blacks were promoted to Grade 13 at only 59% of the rate of whites. Blacks received "Outstanding" (top) performance ratings at only 54% of the rate of whites, including those in Grade 12, the grade at issue in the instant case. In Mr. Handy's organizational unit, during

the period he was eligible for promotion to Grade 13, from 1975 to 1983, 55 similarly situated persons were promoted ahead of him, 3 at the same time as he, and 6 after him (of whom 4 became eligible after him). Mr. Handy was the only candidate with a graduate degree; several white candidates promoted ahead of him had no college degrees. Of the 4 other blacks in the similarly situated group in his organization, none was promoted prior to Mr. Handy's 1980 EEO complaint of race discrimination in promotions. The effect was that whites were more often treated as "fast-trackers" and blacks were much more likely to be regarded as "slow-trackers." This creates an inference that the informal two-track system was a camouflage for discrimination, where white managers could designate white candidates as fast-trackers and black

candidates as slow-trackers. The Agency expressly contended that Mr. Handy was not a fast-tracker. (See above at 12.)

C. The Agency's Deviation from its Written Promotion Criteria Creates an Inference of Discrimination.

This Court held in McDonnell Douglas, supra, and again in McDonald, supra, that discharge criteria must be applied evenly to blacks and whites under Title VII. Substantive procedural deviations in promotions into professional and managerial positions have been found to violate Title VII. Failure to follow the procedure of hiring within the school system was held to demonstrate pretext in Cross v. Board of Education of the Dollarway, Arkansas School Dist., 395 F.Supp. 531, 533-34 (D.C.E.D. Ark., Pine Bluff Div. 1975). In Shaw v. Boorstin, 517 F.Supp. 336, 338-40 (D.C.D.C. 1981), a female librarian with

a graduate degree was rejected for a male with no degree, where the federal facility deviated from normal classification and posting procedures for the position.

In the instant case, the Agency has deviated from rational Promotion Criteria and adopted an informal two-track system which has no established objective criteria or basis in scientific fact. The system is applied to all candidates, with harmful results for black candidates who are perceived by white managers as " slow-trackers." The deviation is massive and sweeping, with widespread results within the Agency. This discriminatory tool is one which this Court must prohibit, as it did the use of facially-neutral tests with disparate impact, in Griggs. This Court has not yet spoken on the use of a discriminatory promotion system; it is

important that it do so, since such systems prevent upward mobility of minorities and women. The guarantees of Title VII should not be limited to entry at the lower levels of the work force; it is imperative that minorities be permitted to assume their rightful place in the professional and managerial ranks, based on merit, if they are to end their status as less-than-equal citizens in our society.

II.

THE DISTRICT COURT'S REFUSAL TO PROPERLY CONSIDER MR. HANDY'S OBJECTIVE QUALIFICATIONS IS AN IMPORTANT ISSUE WHICH THIS COURT SHOULD ADDRESS, IN LIGHT OF AIKENS

A. Petitioner's Legal Training Was Relevant under the Written Criteria.

The Agency's written Promotion Criteria provide that "the relevance of the education and training to the specific job or career field shall be

considered." (Appendix at 59a.)

The District Court did not consider the relevance of Mr. Handy's legal training in comparing him to whites promoted ahead of him because it held "the law degree was not a requirement for Handy's work." (Appendix at 45a. Note: Petitioner did not contend he should have been promoted earlier solely because of his legal training, as the Court stated--he also had longer and superior experience, a higher professionalization score and years of working at Grade 13 duties.) In discounting the relevance of Mr. Handy's legal training, the District Court disregarded Mr. Handy's job description and his staff chief's statements. Mr. Handy's official job description stated as follows:

> OCCUPATIONAL SPECIALTY DUTIES AND RESPONSIBILITIES
>
> 1. Interprets policies...
> ...
> 3. Reviews laws, policies,

directives, regulations and procedures as set forth by the various branches of government...Based upon an analysis and evaluation of these documents, coordinates...the development of implementing documentation....

...

6. Studies proposed legislation and DoD directives to ascertain their effect on personnel, security, medical and training policies and programs...

(Record, A.Exh. 43-44)

Mr. Handy's staff chief wrote as follows:

Mr. Handy has been...since 1978...a Personnel Staff Officer. He is...engaged in planning, studies and management evaluations...Mr. Handy received his law degree...in 1970. His legal background has proven invaluable in the preparation of legislative proposals, and in the review of regulations, instructions and procedures ....His previous experiences in implementation of the Privacy Act and The Freedom of Information Act make him a logical...action officer on issues to be resolved in those areas....

....

...Often he detects statutory or legal issues not readily apparent to those untrained in

> the legal profession.
> ...
> ...Mr. Handy devoted his time and attention to many of the legal aspects of employee benefits contained in Title VI of the proposed Charter Legislation. He prepared several briefs for the [Director of Management] on that subject...His analysis and interpretation of complex legal issues proved to be extremely beneficial to...supervisors.
>
> (Record, A.Exh. 6)

B. Petitioner's Graduate Training Must Be Considered under Aikens.

This Court noted in the case of a black supervisor in the Postal Service who had been denied promotion while whites were promoted ahead of him, that his Master's degree and three years of Ph.D. training should be considered, particularly since none of the white promotees had college degrees. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 n. 2 (1983). The case turned on the standard for a prima facie

case, however: rather than on how to weigh objective qualifications such as education, in comparisons of candidates for purposes of deciding whether the employer's stated non-discriminatory reason for not selecting a minority candidate, is pretextual. The question is posed squarely here. Mr. Handy was the only candidate with a graduate degree (J.D. 1970); yet even white Security Guards with high school diplomas were promoted ahead of him.

CONCLUSION

This Court has previously decided two key issues concerning employment selection devices under Title VII of the Civil Rights Act of 1964: whether facially neutral employment tests with disparate impact are discriminatory (Griggs), and whether harmful procedural

deviations create an inference of pretextuality (McDonnell Douglas and McDonald).

The Court should now provide guidance concerning whether vague or arbitrary selection systems--not just a single test or criterion--are permissible under Title VII, and whether disregard of objective qualifications of candidates creates an inference of pretextuality.

Here, an informal promotion system arbitrarily divides candidates into "fast-trackers" and "slow-trackers," with blacks, including the Petitioner, disproportionately identified as "slow-trackers." Moreover, the informal system overrides the Agency's own written Promotion Criteria. The Petitioner, a black attorney, was deemed not to be a "fast-tracker" although he had performed higher grade duties for years. His objective qualification of a law degree,

used in his work, was expressly discounted by the District Court, where whites with high school degrees were promoted ahead of him.

For the foregoing reasons, it is respectfully requested that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

/Bridget R. Mugane

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1155

Andrew A. Handy, Plaintiff - Appellant

versus

National Security Agency; William E. Odom, Director, and his successors National Security Agency; United States of America,

Defendant - Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, District Judge. C/A No. 81-2972-HAR)

Argued: January 6, 1987
Decided: March 11, 1987

Before PHILLIPS and ERVIN, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Bridget Read Mugane on brief for appellant; Vito Thomas Potenza, National Security Agency (Camilla A. Day; Breckinridge L. Willcox, United States Attorney; Barbara Sale, Assistant United States Attorney on brief) for appellees.

PER CURIAM:

Andrew Handy appeals from the judgment of the District Court entered against him in connection with his complaint of employment discrimination stated by him pursuant to Title VII of the Civil Rights Act of 1964. 42 U.S.C. Sec. 2000e et seq. Handy, a black male, has been employed by defendant National Security Agency since 1965. He alleges that National Security Agency's failure to promote him at one or more times constituted disparate treatment and that, in addition, all or part of such disparate treatment was visited upon him for retaliation for assertion of his claims within the EEO process and the subsequent assertion of his Title VII claims. Handy's complaint was tried in the District Court. After the District

Court had heard evidence in the case, the District Court filed a Memorandum Opinion setting forth factual findings and conclusions of law in a detailed, specific manner. In that Memorandum Opinion, the District Court concluded, after reviewing all of the evidence, that plaintiff was not selected for promotion because other similarly situated persons were appropriately determined to be better qualified for promotion than plaintiff and that there was no causal connection between plaintiff's race and the failure to promote him in the manner which plaintiff desired. Although Handy demonstrated a prima facie case of racial discrimination, the National Security Agency came forward with a non-discriminatory reason for its actions in promoting others ahead of Handy.

See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The District Court properly found that Handy failed to show that the National Security Agency's proferred reason was merely pretextual. Id. at 256. Additionally, the District Court found no evidence of the alleged retaliation. Accordingly, the District Court entered judgment in favor of the defendants. Our own review of the entire record and of Judge Hargrove's Memorandum Opinion leads us to the conclusion that Judge Hargrove's findings of fact were not clearly erroneous. See Anderson v. Bessemer City, 470 U.S. ____, 84 L.Ed.2d 518 (1986). Nor do we find any error of law in connection with the legal standards applied by Judge Hargrove.

Under the circumstances, we affirm the judgment below.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Andrew A. Handy *
Plaintiff
*
v. CIVIL ACTION NO.
* HAR 81-2972
The National Security (consolidated for
Agency * all purposes
Defendant with) HAR 85-2398
* * * *
Andrew A. Handy
Plaintiff *

v. *
Lt. General William E. Odom,
et al. *
Defendants
*

MEMORANDUM OPINION

PART I - PROCEDURAL Posture

Plaintiff Andrew A. Handy (hereinafter referred to as "Handy") filed this federal employee racial discrimination case against defendant National Security Agency (hereinafter referred to as "NSA") on July 2, 1981, in the United States District Court for the District of Columbia, (Civil Case No. 81-1521).

In his complaint Handy alleged that NSA discriminated against him in its "failure to promote [Handy] as rapidly as his white counterparts, and failure to pay plaintiff (a black male) equal wages for the same work as his white counterparts." The complaint also included a retaliation claim as well as the disparate treatment claim.

NSA filed a Motion to Dismiss or In the Alternative, Motion to Transfer on September 11, 1981, to which Handy responded on October 9, 1981.[1] Judge John H. Pratt United States District Judge for the District of Columbia, ordered that the case be transferred to the United States District Court for the District of Maryland.

---

[1]The D.C. District Court granted plaintiff's Motion for Extension of Time to Answer until October 9, 1981.

Pursuant to 28 U.S.C. Sec. 1404 the case was transferred on November 10, 1981, and assigned Civil Action No. 81-2972.

In its Motion to Dismiss filed on January 22, 1982, Defendant NSA argued that this Court did not have subject matter jurisdiction over this discrimination case. It further argued in the companion Motion for Summary Judgment that Handy's claim should be dismissed due to his failure to exhaust his administrative remedies. Handy responded and stated that the court did have proper subject matter jurisdiction since his EEO complaints were initiated in a timely fashion. Handy also stated that he had exhausted his administrative remedies before filing his lawsuit. NSA filed its response to Handy's argument. Handy filed another response to supplement his opposition to NSA's

Motion for Summary Judgment. On December 26, 1983, the court denied the defendant's Motion to Dismiss, since the court did have jurisdiction over the case and also denied the Motion for Summary Judgment since there were disputed material facts at issue in the case.

NSA filed a Motion for a Protective Order which Handy opposed. The court denied the motion on December 26, 1984.

Discovery continued with a stipulated Protective Order. There were numerous motions to compel and related discovery disputes which were eventually resolved before the first pretrial conference.

Handy filed a related suit, Handy v. Lt. General Odom, et al. (HAR 85-2398) on June 6, 1985. In that complaint, Handy sued Lt. General Odom, Director of

the National Security Agency and his successors for the same alleged discriminatory acts. The court, pursuant to F.R.C.P. 42, consolidated the two cases on September 17, 1985.

On December 20, 1985, defendant filed a Motion In Limine requesting a pretrial ruling on the scope of the case, the procedures for presenting evidence, and the admissibility of certain statistical evidence contained in plaintiff's trial exhibits 6, 16a, 16b and 16c. Handy responded and argued that defendant's motion should be struck since it was untimely filed. Since a Motion In Limine can be filed at any time, even during the course of a trial, the court denied Handy's motion to Strike Defendant's Motion In Limine. The court denied the Motion In Limine concerning the admissibility of the

disputed trial exhibits.

Handy and NSA filed separate pretrial orders in violation of Local Rule 35. In his first pretrial order, plaintiff stated that his legal theories of the case included a disparate treatment claim and a disparate impact claim under Title VII, Section 706(f)(3) as well as a retaliation claim. The parties submitted a joint pretrial order at the second pretrial conference held on January 17, 1986. Plaintiff's final amendment to the proposed pretrial order, which stated that Handy had abandoned his claim of disparate impact, was submitted to the Court on January 30, 1986.

A request that the witness list be sealed was approved by the Court.

One of the defendant's witnesses, James R. Bell, one of the plaintiff's

supervisors, testified before the actual start of the trial with the consent of both parties and the court since Mr. Bell had made previous arrangements to be out of the United States for the month of February.

The actual non-jury trial lasted from February 3, 1986, to February 6, 1986. Pursuant to Rule 52 of the F.R.C.P., the court enters its findings of fact, summaries of counsels' arguments and conclusions of law in the above-entitled case.

PART II - FINDINGS OF FACT

1) NSA is an intelligence component of the Department of Defense. It has a foreign intelligence mission that includes signals intelligence, communications security and computer security. It is organized into several major organizations called Key

Components. Each Key Component is headed by a Deputy Director and has specific mission related duties. The Administrative (M) organization is the Key Component charged with providing personnel, security, and medical support services. It is comprised of subordinate offices that report to the Deputy Director for Administration (hereinafter referred to as "DDA"). The P&E Staff is a subordinate organization that supports the DDA.

2) NSA had a defined Agency Promotion System between October 1975 and April 1983. Individuals were eligible for promotion to Grade 13 if they had one year in Grade 12 and were certified in a professional career area. There is an exception to the professional certification requirement policy as stated in NSA's promotion

Criteria, Section 3-3(g), (Plaintiff;s Exhibit #8) as follows:

> [A]n employee who has met professional certification requirements in any career field may be promoted to a supervisory position at the GG-13 level and above, without regard to the certification requirements as long as the employee is otherwise qualified to fill that position. In specific cases where it is for the good of the Service, the Deputy Director for Administration may suspend the application of requirements of the Professionalization Program for any position in the Agency.

Those employees who were eligible for promotion to Grade 13 were automatically reviewed quarterly in the following steps from 1978-82. The M 13 Promotion Board Chair solicited nominations from staff and office chiefs to be submitted through him to the board, which included at least one minority member and one woman member. The board reviewed each nominee's promotion folder which included

employment information and performance evaluations. The board heard testimony from the staff chiefs on the nominees. All of the non-nominated eligible employees' promotion folders were reviewed by two board members. After this review, the two board members were able to recommend that certain employees be "added on" to the list of nominees.

Board members repeatedly discussed and voted upon eligibles until they reached a consensus on the candidates to be recommended to the DDA for promotion.

Board members then sent a ranked list to the DDA, who formulated his own prioritized list for recommendation to the Agency-wide 13 Promotion Board. The DDA usually recommended about twice the number that he anticipated would be promoted, based upon the M organization's "fair share" of the Grade

13 promotions. The DDA could 'add-on' or delete names from the M board list. The DDA submitted his recommendations to the Agency-wide Grade 13 promotion board.

The Agency-wide board which included at least one minority and one woman member reviewed the performance folders of recommended candidates, heard testimony about them from the organization chiefs and sometimes from organization members on the board. Two Agency-wide board members also reviewed the performance folders of all eligibles not recommended by the organization chiefs, and could bring the name of an eligible to the attention of the board for its consideration. The board could also recommend its own 'add-on' candidates.

After discussion, board members

voted on a prioritized ranking of candidates which they recommended to the Agency Deputy Director, who made the final decision concerning all NSA promotions to the GG-13 level.

Agency promotion criteria were contained in Agency PMM Chapter 337.3 as follows:

3-2. EEO Considerations. -- As a means of identifying the best and most appropriately qualified candidates for promotion, all eligible employees will be evaluated against the criteria set forth below without regard to race, color, religion, sec, national origin, politics, marital status, physical handicap, or age. In considering the qualifications of member of minority groups and women not possessing competitive training and experience, greater weight will be given to the criteria of job performance and potential, to neutralize the effect of any lack of opportunity for equitable training and experience afforded these employees in the past.

3-3. Specific Criteria.

a. Job Experience. -- In evaluating job experience,

particular emphasis shall be placed on the knowledge, skills and abilities which are needed for successful performance at the higher grade. Experience considered will include current and former assignments, special tours undertaken or projects worked on, and relevant prior military service and non-NSA/CSS civilian experience. The length of time in grade is not a determinant in evaluating the nature, depth or quality of experience.

b. Training. -- An evaluation of training shall include consideration of education, Agency sponsored training and training undertaken by the individual on his/her own initiative. Also, the relevance of the education and training to the specific job or career field shall be considered.

c. On-the-Job Performance. -- Quality of performance in the individual's current job and previous Agency jobs is an important indicator of how well the employee will perform in a higher level job. An appraisal of performance shall center around those factors in the present job which are also significant in the job to be filled. Depending upon the nature of the duties involved in the proposed position, the following factors may be considered in varying degrees.

(1) Essential knowledge required;

(2) Mental demands;
(3) Personal work relationships;
(4) Effect of decisions;
(5) Supervision received; and
(6) Supervision exercised.

d. Potential. -- The individual's potential shall be evaluated on the basis of the individual's demonstrated knowledge, skills, abilities and personal attributes.

e. Personal Attributes and Abilities. -- There are a number of qualities personal to the individual that influence how well or poorly the person will perform in the next higher level job. They are:

(1) Creativity and innovativeness--the ability to see beyond the part to the whole problem and to visualize alternatives to solving the problem. Also, the ability to devise ways to effectively implement the solution is an important factor.
(2) Drive, initiative and perserverance--best demonstrated by enthusiasm, energy, self-motivation, and high degree of determination and diligence.
(3) Dedication--a commitment to the mission of the Agency, devotion to duty and faithfulness to the trust placed in the individual.
(4) Ability to work with others--the ability to cooperate

with and obtain the cooperation of others.
(5) Ability to communicate-- the ability to communicate information effectively, orally or in writing, as required for the successful performance of the job.

3) NSA reviewed candidates for promotion to GG-13 quarterly from 1980 to 1982. The quarters were divided as follows:

(1) Fourth Quarter of FY 1980 -- April 1980 to June 1980 with promotions announced on July 18, 1980 called July cycle.

(2) First Quarter of FY 1981 -- July 1980 to September 1980 with promotions announced on October 17, 1980 for first quarter of FY 1981.

(3) Second Quarter of FY 1981 -- October 1980 to December 1981 with promotions announced on January 19, 1981 called January 1981 cycle.

(4) Third Quarter of FY 1981 --

January 1981 to March 1981.

This review system was changed in 1983.

4) NSA used various forms to evaluate employees including the inventory of attributes form (hereinafter referred to as "PIB") used in 1983, which listed the five criteria found in Section 3.3e and utilized a grading system of 90-99 Superior; 75-89 Above Average; 50-74 Average; 25-49 Below Average and 01-24 Poor. In another evaluation form which was used in 1980, 1981 and 1982, the employee performance appraisal form, the ratings ranged from

U - Unsatisfactory

M - Marginal

S - Satisfactory

E - Excellent

O - Outstanding

The employee also completed his own personnel summary which contained a summary of his education, recommendations and awards, and work experience. Each time an employee was considered for promotion, his supervisor would write a Statement of Justification for Promotion to GG-13 which included a description of his current assignment, prior experience and performance.

5) Plaintiff Handy, a black male, was hired by defendant NSA in 1965 as a Grade 7 assigned to NSA's Fort Meade, Maryland headquarters. Since 1969 Handy has worked in the M organization which is part of the Department of Administration at Fort Meade. He was professionally certified as a Personnel Officer in 1972. In October 1974, Handy was promoted to a Grade 12. Since 1978 Handy has been assigned to the Plans and

Evaluations Staff (hereinafter referred to as "P & E Staff") of the M organization.

6) Handy attended the University of Maryland from 1958 to 1963 and received a B.A. in Political Science. He also attended the University of Baltimore School of Law from 1967 to 1970, and received a J.D. in Law. He was admitted to the Maryland Bar in 1972.

7) Handy filed a formal EEO complaint on September 29, 1980, after his July 9, 1980 discussions with an EEO counselor, Dorotha Smith. This complaint was rejected on October 31, 1980 as untimely and for failure to prosecute. Handy appealed that decision to the EEOC on November 17, 1980. The EEOC affirmed NSA's rejection of the complaint.

Handy initiated informal counseling offered by NSA for his EEO complaint

again on February 11, 1981, concerning his continuing non-promotion in January, 1981. His EEO complaint was later amended to include his non-promotion in April, 1981. A notice of final interview was served on June 24, 1981. On july 2, 1981, Handy filed a formal complaint of discrimination with the NSA's EEO office alleging a continuing violation of his constitutional rights due to NSA's alleged discriminatory practices which resulted in Handy's non-promotion. An EEO hearing was held on November 5, 6 and 7, 1984. On March 7, 1985, the hearing examiner denied his claim of discrimination.

PART III-THE LAW OF DISPARATE TREATMENT

In Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977), the Supreme Court stated that:

"[d]isparate treatment ... is the

> most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. [Citation omitted.]

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) the Supreme Court stated that:

1) The plaintiff must establish a prima facie case of discrimination by disparate treatment;

2) The plaintiff must offer a legitimate, nondiscriminatory reason for its actions; and

3) The plaintiff must establish that this supposedly legitimate, nondiscriminatory reason was a pretext to mask an illegal motive.

In three cases following the McDonnell Douglas decision, Texas

Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) and Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the Supreme Court emphasized that in disparate treatment cases, the burden of proof concerning discrimination remains, at all times, with the plaintiff and that the employer's sole obligation at the second stage is simply to articulate a legitimate nondiscriminatory reason for its behavior rather than to establish by a preponderance of the evidence that its proffered reason was the real reason.2

In the third stage the plaintiff also has the burden of proof to establish that the defendant's articulated reason for its alleged discriminatory actions is pretextual.

In disparate treatment cases, once the plaintiff's prima facie burden has been met, "the burden of production on the defendant does not require the employer to persuade the court by a preponderance of the evidence that it was motivated by the proffered reason since the evidence need only be legally

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[2]Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP 113 (1981), (employer need only come forward and articulate its reason so as to create a triable issue of fact and need not prove by a preponderance of evidence that such reason constituted its true motivation and need not prove that the selected candidate had superior qualifications); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 18 FEP 520 (1978) (employer need only articulate a legitimate, nondiscriminatory reason and need not prove the absence of discriminatory motive); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 17 FEP 1062, 1066 (1978), ("[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race").

admissible and not be intrinsically unworthy of acceptance and the reason advanced [for its actions] be a legitimate one." Charlene Monroe v. Burlington Industries, Inc., F.2d ____ (1986) (4th Cir. 1986 - No. 84-2362, slip opinion at p.9 - filed February 28, 1986.) See also Lovelace v. Sherwin Williams Co., 681 F.2d at 230, 244 (4th Cir. 1982).

In a disparate treatment case, plaintiff must prove discriminatory animus or intent. Texas Department of Community Affairs v. Burdine, supra at 256. An intent to discriminate is required although plaintiff may establish a prima facie disparate treatment case without actual proof of intent. Intent can be shown by circumstantial evidence. International Brotherhood of Teamsters v. United

States, supra at 325, n.15 (1977).

PART IV - RETALIATION

In addition to a disparate treatment claim, Handy's complaint also contained a retaliation claim. Handy stated NSA intentionally discriminated against him because of his participation in the EEO process and his assertion of Title VII claims. A prima facie case of retaliation consists of three elements:

1. The employee engaged in protected activity such as filing an EEO claim;

2. The employer took adverse employment action against the employee; and

3. A causal connection existed between the protected activity and adverse action. "The employer's knowledge that the employee has engaged in protected conduct is not really a

distinct element ... but is necessarily subsumed in the requirement of a causal connection, for if the employer did not know of the protected activity, a causal connection to the adverse action cannot be established.." Ross v. Communications Satellite Corp., 759 F.2d 355, 365, n.9 (4th Cir. 1985). A plaintiff alleged retaliation would not have occurred "but for" the protected conduct. Ross, supra at 365-66; EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 669 (4th Cir. 1985), rev'd on other grounds sub nom. Cooper v. Federal Bank of Richmond, 467 U.S. 867 (1984). This "but for" standard directs the fact-finder's attention to the predominant reason for the employer's action so that the court can determine if an employer is penalizing an employee for exercising his constitutional right

to file an EEO claim.

PART V - DISCUSSION

At trial Handy contended that NSA's failure to promote him to a Grade 13 position prior to April 1983 was an unlawful employment practice under Title VII, Section 703(i) which prohibits discrimination "against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race." The court limited its consideration of Handy's Title VII to NSA's allegedly discriminatory acts from October 1975 to April 1983 since the plaintiff was first eligible for promotion in October 1975 and was not promoted until April 1983.

There are usually three categories of evidence that are introduced by the plaintiff to meet his burden of proof in a disparate treatment case. These

include direct evidence of motive, statistical evidence and comparative evidence.

DIRECT EVIDENCE

Handy stated that NSA's failure to promote him to Grade 13 from October 1975 to April 1983 was due to racial discrimination by his white supervisors. He emphasized at trial that he received overall excellent ratings in his quarterly employee evaluations rather than outstanding ratings which he alleged were necessary for promotion. But the evidence before the court clearly showed that come M organization employees who had received only excellent ratings were promoted were promoted to Grade 13. The only time Handy was rated overall outstanding was in 1978 when he was reviewed by Josiah C. Thomas, a black supervisor.

During that time period Handy had been on special assignment and was responsible for the development and updating of 12 chapters of the Personnel Management Manual and related supplementary material. Nevertheless, Handy provided the Court with no concrete or implied evidence that any of his white supervisors ever displayed any racial prejudice towards him or acted in any discriminatory manner towards him. There were no racial slurs or statements made by any supervisors. When questioned by the Court if he had any evidence that his supervisors were motivated by any type of discriminatory animus, Handy responded that he had none. Handy also could not provide the court with any evidence that his promotion was delayed due to discriminatory treatment by NSA or that

there had been any retaliation by the defendant due to Handy's EEOC claim.

STATISTICAL EVIDENCE

Handy's expert witness, Judy Olian, had excellent academic credentials with a B.A. in Psychology, M.S. in Industrial Relations and a Ph.D in Human Resources. The Court qualified Dr. Olian as an expert witness in the limited field of human resources and management not as an expert statistician. In her analysis of the M organization employees, Dr. Olian did not divide her sample into groups of blacks and whites added the additional variable of sex since her sample was broken down into black males, black females, white males and white females. Dr. Olian only looked at selected employee's performances for her statistical analysis of this case. She

did not have sufficient data in her sample of M organization employees to utilize a regression analysis[3]. Her research revealed the following findings:

1) There was a significant correlation between an NSA employee appraisal rating and his time of promotion.

2) There was no significant correlation between personality attribute evaluation and promotion.

[3]Regression analysis has been recognized by the courts as one of the most valid and conclusive statistical techniques in disparate treatment cases. See: Hazelwood School District v. United States, 433 U.S. 299, 311 n.17 (1977); Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978); James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); Kaplan v. International Alliance of Theatrical & Stage Employees, 525 F.2d 1354 (9th Cir. 1975).

3) In her pool there were 63 M group employees, five of whom were black.

4) All five blacks were promoted to Grade 13; Handy was the last to be promoted. Out of the 39 M organization employees promoted between April 1980 and July 1983, five were black.

Dr. Olian's testimony did not provide any evidence to support Handy's claim of disparate treatment or his related claim of retaliation.

COMPARATIVE EVIDENCE

Plaintiff based his case upon his comparison of nine other M organization employees who were considered in the promotion cycles from July 1980 to October 1982. His testimony consisted of his analysis of these individuals' qualifications and professional experience as shown in their personnel summaries and PIBs. He attempted to

show why he was a better qualified candidate for promotion than any of the nine employees who were promoted before him.

The nine individual employees were identified by either name or by number. There were: Sandra Ray, Jeff Rank, from July 1980 cycle; Mary Schindler, from October 1980 cycle; #228, from the January 1981 cycle; Barbara Paisley and Wayne Holt, from the July 1981 cycle; Pete Dillon and Clyde Willis, from the January 1982 cycle; and, Cliff Colditz, from the October 1982 cycle.

The evidence before the court clearly demonstrated that there was a legitimate business, non-discriminatory reason for promoting each of these nine people before Handy. Between July 1980 and April 1983 there was a limited number of promotions allocated to the M

organization due to the NSA Promotion Program which was in effect. This program emphasized rewarding critical skill employees and employees who had field service. Handy's work was not included within the category of critical skills vital to the operation of the M organization. This program was also designed to promote quickly persons with outstanding performance and high potential for future advancement so that they would remain NSA employees. The program also rewarded employees who although they were not outstanding had consistently been faithful and excellent performers for a long period of time. Each of the nine employees to whom Handy compared himself fitted into one of the two classes of employees who were properly promoted during this time period of extremely limited promotions.

Sandra Ray, who was promoted in the July 1980 cycle, had a degree in psychology and was professionally certified. This white female had been employed by NSA for approximately 11 years as of January 1980. Between 1974 and 1980 she had received ten commendations and awards and had taken many NSA/CSS courses, which directly related to her work as a personnel staff officer, with a total number of 817 study hours between 1968 and 1980. Her work had been consistently excellent and necessary to the M organization for a period of years.

Jeff Rank, a white male, was also promoted in the July 1980 cycle. He had received his B.A. degree in 1966 and had been employed by NSA for approximately 14 years at the time of his promotion. From October 1968 to June 1979 he had

received 15 commendations and awards. He also had taken 13 courses directly relating to his work as a Security Staff Officer, totalling 1146 study hours. His work as a Security Staff Officer was vital to the M organization.

Mary Schindler, a white female, was promoted in the October 1980 cycle. She was professionally certified and had 19 years of employment with NSA as well as 11 commendations and awards. She had worked for the agency overseas and had supervisory experience. She had taken 22 work related courses totalling 880 study hours and also had been a NSA representative at interagency meetings concerning personnel management.

In January 1981, M organization employee #2284, a white male, was

[4]The name of #228 was not revealed but his personnel records were part of the evidence.

promoted to GG 13. This personnel staffing officer was professionally certified and had been a NSA employee for more than 14 years at the time of his promotion. He had received 6 commendations and awards and had significant administrative experience. He had experience and training in computers and had implemented an Automated Procedure to identify HQS assignments for NSA employees returning to the United States from field service. He had also had taken 16 work related courses at NSA totalling 746 hours. He was a longstanding employee in the critical skills area of the M organization.

Wayne Holt, a white male, was promoted to GG 13 in July 1981. This Facilities Security Officer who was professionally certified had been an NSA

employee for over 28 years and had received 15 commendations and awards. He had also attended 7 work related courses and seminars[5]. His long service to NSA was evident and he was Chief of Security Operations Center from August 27, 1979 until July 5, 1981, with many administrative responsibilities.

Barbara Paisley, a white female, was promoted in July 1981. Although she was not professionally certified, her work was vital to the M organization; so her promotion was consistent with the provisions of Section 3-3(g) of NSA's Promotion Criteria[6]. She had been an NSA employee for over 14 years and received 7 awards and commendations.

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[5]The court was not provided with a specific number of hours involved in the seminars.

[6]See p.5 and 6 for the description of this Section.

Her work was in the critical skills area and she was certified as a linguist and as a cryptanalyst.

Pete Dillon, a white male, was promoted in the January 1982 cycle. This Facilities Security Officer had a B.S. degree, was professionally certified and had been an NSA employee for over 20 years. He had received 14 commendations and awards and had attended 11 work related courses and seminars[7]. He had extensive administrative experience.

Clyde Willis, a white male, was promoted in the January 1982 cycle. This Facilities Security Officer had a B.A. degree, was professionally certified and had been an NSA employee for over 24 years. He had received 16

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[7]Same as footnote 5.

commendations and awards and had attended 18 work related courses and seminars[8].

Cliff Colditz, a white male, was promoted in the October 1982 cycle. This Personnel Staffing Officer was professionally certified and had been an NSA employee for over 18 years. He had received 24 commendations and awards and had taken 7 work related courses at NSA and CSC, totalling 672 study hours. He served as Chief of the Support Branch of the Employment Division with various supervisory responsibilities.

In comparison to the above-described M organization employees, Handy received only 2 commendations and awards. He was professionally certified and had been an NSA employee for 15 years as of June 1980. He had taken 6 work related

[8]Same as footnote 5.

NSA or CSC courses and had attended one seminar. His work was not in the critical skills area. Throughout the trial, Handy's counsel placed undue emphasis upon the fact that Handy had a law degree and that this fact alone should have entitled him to promotion earlier. The court found that argument specious, since the law degree was not a requirement for Handy's work. Handy had applied to work as an attorney in the legal branch of NSA, the General Counsel's Office, but had been rejected due to his lack of legal experience. (Plaintiff's Exhibit 26b).

At the close of the plaintiff's case, defendants moved for dismissal. The court denied the motion.

DEFENDANTS EVIDENCE

James R. Bell, one of the plaintiff's white supervisors, testified

that in his opinion Handy was an excellent but not an outstanding employee. Bell stated that his evaluation of Handy was based on his overall performance including but not limited to the following factors: the quality of work, his initiative and ability to meet deadlines. Bell stated that he did not consider Handy's race in any matter in his evaluation of Handy. Bell recommended Handy for promotion to Grade 13 and wrote statements of justification on August 26, 1980 (Plaintiff's Exhibit 2a); February 27, 1981 (Plaintiff's Exhibit 2b)' May 28, 1981 (Plaintiff's Exhibit 2c); and September 24, 1981 (Plaintiff's Exhibit 2d). Handy was not promoted any of these times. Bell stated that neither racial discrimination nor Handy's EEOC complaint was a factor in Handy's

non-promotion.

Defendant's next witness was a black female, Dorotha Smith, one of NSA's EEO counselors. She stated she was aware of Handy's EEOC complaint and that she had investigated his allegations of racial discrimination by comparing Handy's qualifications with the other Grade 12 M organization employees.

In her Counselor Report Summary, Smith stated that she had:

> a. Made a ten year comparison of Mr. Handy's promotion and assignment record with that of all GG-12s in his organization;
>
> b. Compared the job assignments and advancement of blacks with those of non-blacks, i.e., females with females, males with males, and the total non-black population against the organization's black population;
>
> c. Looked at the records of those that Mr. Handy had identified as being pushed ahead of him;

> d. Discussed the discrimination charge with organization officials; and,
>
> e. Looked at the promotion and assignment records of all GG-13s in the organization [in] question, comparing the records of blacks with those of non-blacks.
>
> ...and concluded that she had found no evidence that Mr. Handy had been discriminated against...(Defendant's Exhibit #27).

Smith also concluded after her analysis of all of the M organization employees that there was a tremendous backlog in the M group who were waiting to be promoted and that many qualified people could not be promoted due to the limitations on the number of possible promotions. Smith also stated that she had no reason to believe that the plaintiff had been discriminated against by any of his supervisors or promotional board members.

From September 1979 to 1982 Mr. James Lucas, a white male, was one of the plaintiff s supervisors. He stated that in his opinion although Handy was an overall excellent employee, Handy had difficulty in meeting internal deadlines and was often late in completing work assignments. Lucas stated that he had informed Handy about work-related problems. Lucas stated that he first learned of Handy's EEO complaint in November 1980 but that his knowledge did not affect his evaluation of Handy.

David Riddle was the Executive Officer to the M Promotion Board from 1976 to March 1981 and the Chairman of the M Promotion Board from June 1982 to May 1985. Riddle stated that in the mid-1970s and early 1980s there were many external restraints imposed on the number of NSA's promotions by the

Department of Defense. He estimated that in the early 1980s only 10% of the eligible NSA employees were promoted to Grade 13 and that most of these employees were in the critical skills field. Riddle stated that the Director of NSA had delivered both a written and oral charge to the Agency Promotion Board Members. This charge (Defendant's Exhibit 1g) listed the following six areas of specific concerns and considerations involved in the promotion process: EEO; Field Service; managers and non-managers; critical skills; time-in-grade; achievement potential and long and significant service to the agency.

Riddle stated that in the July 1980 promotional cycle, Handy was an "add-on" by the Board but was not promoted since the Agency Promotion Board determined

that there were other NSA employees more qualified for promotion than the Plaintiff.

Riddle stated that in the fiscal year 1981, second quarter cycle there were eight employees recommended for promotion from the M organization and that out of the three employees who were promoted to Grade 13, one was black. In the promotion cycle for the first quarter of fiscal year 1983, out of the ten nominations from the M organization, five were promoted, two of whom were black.

Like Handy's other white supervisors, Riddle stated that he was not motivated by any racial discrimination and had not observed any evidence of any racial prejudice during his experience with the NSA Promotional Boards. Riddle also testified that he had no knowledge

of Handy's EEO complaint.

John Hamilton, a white male, was Handy's third level supervisor in 1982 and 1983. On May 25, 1982, Hamilton recommended Handy for a promotion to Grade 13, but Handy was not promoted. He recommended Handy for promotion on January 19, 1983 and Handy was promoted in April, 1983. Hamilton stated that race was never a negative factor in NSA's consideration of the promotional process and that to the best of his knowledge, the members of the Board were not aware of Handy's EEO complaint.

The Assistant Deputy Director for Administration, Mr. Pryde, a black male, reviewed the promotional folders of the minority employees to ensure that qualified minority employees were on the promotion list. Pryde stated that in his opinion, after his review of Handy's

qualifications and evaluations, Handy did not have as much potential to move up to a higher grade in 1981 and that he lacked initiative in his job performance. Pryde stated that he was aware of Handy's EEO complaint but that it was not discussed at the Board meeting. Pryde had not seen any evidence in his experience with the Promotional Boards that Handy's non-promotion was due to racial discrimination.

The defendant's last witness was Louis Bonanni, a white male, the Deputy Director of Administration in 1980. He stated that he had never discriminated against Handy due to his race. He stated that he learned about Handy's EEO complaint sometime in 1980 but he never used that information as a negative factor when he considered Handy as a

possible candidate for promotion to Grade 13. Bonanni also testified that to the best of his recollection no one on the Agency Board had discussed Handy's EEO claim.

CONCLUSION

After carefully reviewing all of the evidence before us, the court finds that plaintiff was not selected for promotion to Grade 13 until April 1983 because the similarly situated people in the M organization, who were promoted to Grade 13 from October 1975 to April 1983, were properly judged to be better qualified for promotion than the plaintiff.

The court also finds that there was no causal nexus between the plaintiff's race and the fact that although he was eligible, he was not promoted to Grade 13 until April 1983.

There was no evidence at the trial

which showed any basis for the plaintiff's retaliation claim since most of his supervisors and members of the promotion boards were unaware of Handy's EEO claims and there was no evidence presented to the court of any racially discriminatory behavior or retaliatory conduct by the supervisors who knew about Handy's EEO compliant.

Therefore, the court orders judgment in favor of the defendants as to all claims in the above-entitled consolidated cases.

_____

John R. Hargrove
United States District Judge

_____

DATE

SECTION 3

PROMOTION CRITERIA

3-1. General. - The qualifications of all individuals eligible for promotion are evaluated in terms of the standards published in the NSA/CSS Career service Occupational Handbook. Individuals selected for promotion must meet the standards and possess the qualifications for the grade under consideration.

3-2. EEO Considerations. - As a means of identifying the best and most appropriately qualified candidates for promotion, all eligible employees will be evaluated against the criteria set forth below without regard to race, color, religion, sex, national origin, politics, marital status, physical handicap, or age. In considering the

qualifications of members of minority groups and women not possessing competitive training and experience, greater weight will be given to the criteria of job performance and potential, to neutralize the effect of any lack of opportunity for equitable training and experience afforded those employees in the past.

3-3. Specific Criteria.

a. Job Experience. - In evaluating job experience, particular emphasis shall be placed on the knowledges, skills, and abilities which are needed for successful performance at the higher grade. Experience considered will include current and former assignments, special tours undertaken or projects worked on, and relevant prior military service and non-NSA/CSS civilian experience. The length of time in grade

is not a determinant in evaluating the nature, depth or quality of experience.

b. Training. - An evaluation of training shall include consideration of education, Agency sponsored training and training undertaken by the individual on his/her own initiative. Also, the relevance of the education and training to the specific job or career field shall be considered.

c. On-the Job Performance. - Quality of performance in the individual's current job and previcus Agency jobs is an important indicator of how well the employee will perform in a higher level job. An appraisal of performance shall center around those factors in the present job which are also significant in the job to be filled. Depending upon the nature of the duties involved in the proposed position, the following factors

may be considered in varying degrees:

(1) Essential knowledge required;
(2) Mental demands;
(3) Personal work relationships;
(4) Effect of decisions;
(5) Supervision received; and
(6) Supervision exercised.

d. Potential. - The individual's potential shall be evaluated on the basis of the individual's demonstrated knowledge, skills, abilities, and personal attributes.

e. Personal Attributes and Abilities. -- There are a number of qualities personal to the individual that influence how well or poorly the person will perform in the next higher level job. They are:

(1) Creativity and innovativeness--the ability to see beyond the part to the whole problem and to visualize alternatives to solving the problem. Also, the ability to devise ways to effectively implement the solution is an important factor.

(2) Drive, initiative and perserverance--best demonstrated by enthusiasm, energy, self motivation, and

high degree of determination and diligence.

(3) Dedication--a commitment to the mission of the Agency, devotion to duty and faithfulness to the trust placed in the individual.

(4) Ability to work with others--the ability to cooperate with and obtain the cooperation of others.

(5) Ability to communicate-- the ability to communicate information effectively, orally or in writing, as required for the successful performance of the job.

f. Test Requirements. - Agency aptitude, achievement and proficiency tests are required prior to promotion when specific skills or knowledges must be measured before an individual can be considered qualified for a specified occupational specialty. Specific test requirements are set forth in PMM Chapter 325, Personnel Testing, and the NSA/CSS Career Occupational Handbook. The Director, Civilian Personnel has authority to waive test scores when it is established otherwise that the

individual is qualified.

g. Professional Certification. - Promotions to professional level jobs and specialist level jobs require prior professional certification by the career panel governing the career field, in accordance with the schedule provided in PMM Chapter 402. As an exception to this policy, an employee who has met professional certification requirements in any career field may be promoted to a supervisory position at the GG-13 level and above, without regard to the certification requirements for that position as long as the employee is otherwise qualified to fill that position. In specific cases where it is for the good of the Service, the Deputy Director for Administration may suspend the application of requirements of the Professionalization Program for any

position in the Agency. (See PMM Chapter 402, Professionalization Program, and the NSA/CSS Career Service Occupational Handbook.)

h. Employee Attributes. - The rating supervisor shall complete the Inventory of Attributes, Form P1B, annually on all civilian employees in grades GG-12 through GG-15, except for those individuals on extended external training. This procedure is designed to provide a means of documenting an assessment of an employee's attributes by evaluating those attributes against a numeric scale and provide management with data for comparing employees. The supervisor should make and retain a copy of the completed form. The reviewing official shall forward the entire package to Personnel Operations for inclusion in the employees promotion

folder. Instructions for completion of Form P1B are contained in Annex C.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-249

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANDREW A. HANDY, PETITIONER

v.

NATIONAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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ANDREW A. HANDY, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that respondents—the National Security Agency (the NSA) and its officers—denied him a promotion on the basis of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

1. The NSA is the intelligence component of the Department of Defense (Pet. App. 12a). From October 1975 to April 1983, the NSA had a defined Agency Promotion System (*id.* at 13a). Under this system, employees were eligible for promotion to Grade 13 if they had served one year in Grade 12, and either were certified in a professional career area or their promotion was nonetheless found to be "for the good of the Service" (*id.* at 13a-14a). Those employees who were eligible for promotion to Grade 13 were reviewed quarterly under the evaluation criteria established by the defined Agency Promotion System (*id.* at 14a; see also *id.* at 14a-22a).

Petitioner, a black male, was hired by the NSA in 1965 and assigned as a Grade 7 to the agency's Fort Meade, Maryland headquarters (Pet. App. 22a). In 1970, he

received a law degree from the University of Maryland (*id.* at 23a); in 1972, he was professionally certified as a Personnel Officer (*id.* at 22a); and, in 1974, he was promoted to Grade 12 (*ibid.*). Although petitioner was evaluated on a quarterly basis thereafter, he was not promoted to Grade 13 until April 1983 (*id.* at 31a).

2. Beginning in 1980, petitioner filed a series of administrative complaints concerning the NSA's failure to promote him to Grade 13 (Pet. App. 23a-24a). These administrative complaints were denied for a variety of procedural and substantive reasons (*id.* at 24a). Petitioner then filed suit against the NSA and its officials, alleging that the NSA had failed to promote him to a Grade 13 position prior to April 1983 because of his race and in retaliation for his equal employment opportunity complaints (*id.* at 29a, 31a).

At a trial held with respect to his claims of disparate treatment,[1] petitioner did not introduce any direct evidence showing that his supervisors were motivated by any discriminatory animus or that his promotion was delayed due to his EEO claims (Pet. App. 33a-34a). Rather, petitioner attempted to show that the subjective evaluation system upon which NSA relied resulted in a slower promotion rate for black employees at Grade 12 than for white employees at Grade 12 (*id.* at 32a-35a); among other things, he introduced evidence to the effect that, between 1980 and 1982, the NSA promoted nine white employees whose qualifications were allegedly inferior to his (*id.* at 36a-45a).[2] In response, the NSA

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[1] Petitioner expressly abandoned any claim based on a disparate impact theory prior to trial (Pet. App. 11a).

[2] Concomitantly, petitioner purported to show, through the testimony of an expert witness, that between 1979 and 1983, the agency-wide ratio of promotions to eligibility among black Grade 12 employees was only 59% that of whites (II C.A. App. 32). The same

presented evidence purporting to show that, during the relevant period, 63 employees in the unit in which petitioner worked—the "M" organization—became eligible for promotion to Grade 13, that 55 of these persons (including the other four black employees in the group) were promoted ahead of petitioner, and that the median "time in grade" for all those promoted was the same as the median "time in grade" for the five black employees in the unit (*id.* at 47a-48a; I C.A. App. 80, 91, 96-98); in addition, the NSA presented testimony of various supervisors and managers to the effect that there were a limited number of promotions available and that all employees promoted ahead of petitioner had superior qualifications or evaluations (Pet. App. 45a-46a, 49a-54a).

After reviewing all of the testimony and evidence, the district court entered judgment in favor of respondents (Pet. App. 55a). It rejected reliance on petitioner's graduate and law degrees, noting that petitioner's "work was not in the critical skills area" and that "the law degree was not a requirement for [petitioner's] work" (*id.* at 45a). The court further found that "plaintiff was not selected for promotion to Grade 13 until April 1983 because the similarly situated people in the M organization, who were promoted to Grade 13 from October 1975 to April 1983, were properly judged to be better qualified for promotion than the plaintiff" (*id.* at 54a). Finally, it found that "there was no causal nexus between the plaintiff's race and the fact that although he was eligible, he was not promoted to Grade 13 until April 1983" (*ibid.*).

3. In a brief per curiam opinion, the court of appeals affirmed the judgment of the district court (Pet. App.

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expert testified that there was a substantial disparity (from 1975 to 1983) between the proportion of black Grade 12's rated "outstanding" and the proportion of white Grade 12's rated "outstanding" (II C.A. App. 27).

1a-5a). It "review[ed] * * * the entire record" and found that the district court's "findings of fact were not clearly erroneous" (*id.* at 4a). Nor did it find "any error of law in connection with the legal standards applied by [the district court]" (*ibid.*).

4. The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioner first alleges (Pet. 10-19), contrary to the decisions of the courts below, that what he calls respondents' "vague and arbitrary two-track promotion system" unlawfully discriminated against black employees such as himself. But petitioner's suggestion does not merit review by this Court. To the extent that petitioner is suggesting that the courts below should have held that respondents' subjective evaluation system had an unvalidated disparate impact on black employees, he is raising a claim that he expressly abandoned in the district court (Pet. App. 11a). He cannot raise that claim for the first time in this Court. See *Youakim* v. *Miller*, 425 U.S. 231, 234-236 (1976) (per curiam). And to the extent that petitioner is suggesting (Pet. 13-14) that the courts below should have held that this subjective evaluation system is a "camouflage" for a pattern-and-practice of "irrational and arbitrary" disparate treatment, he is raising an entirely fact-bound argument that was rejected by both courts below; accordingly, the argument does not merit certiorari review. Accord *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8. In any event, the record overwhelming establishes that NSA's promotion system did not have a disparate effect on black workers and that the people who were promoted ahead of petitioner were objectively more qualified than he. Thus, however petitioner's suggestion is viewed, it is clearly wrong.

b. Petitioner also errs in suggesting (Pet. 19-23) that the district court's decision to discount the significance of his graduate and law degrees warrants review by this Court. The district court did not hold that graduate and law degrees are inherently insignificant or unimportant job qualifications. It merely held that they were not manifestly related to the requirements of petitioner's work (Pet. App. 45a). This factbound conclusion, affirmed by the court below, raises no legal question warranting review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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